No. 9251. 18

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES A. ACKROYD, DWIGHT S. BRIGHAM, MORRIS F. LaCROIX, EARLE L. CARTER, J. EDWARD STEVENS and FRANK E. NELSON,

Appellants,

vs.

WINSTON BROTHERS COMPANY, a corporation,

Appellee,

and

BRADY IRRIGATION COMPANY, a corporation,

Appellant,

vs.

WINSTON BROTHERS COMPANY, a corporation,

Appellee.

BRIEF OF APPELLEE

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TEXT BOOKS

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BRIEF OF APPELLEE

This suit in equity was instituted by Brady Irrigation Company, a corporation, for the purpose of obtaining a declaratory judgment that the defendant, Winston Bros. Company, did not have a lien upon the assets of the defendant, Teton Co-Operative Reservoir Company, by reason of a judgment against that company, and for the further purpose of preventing defendant, Winston Bros. Company, from levying execution under its judgment against the property of Teton Co-Operative Reservoir Company.

James A. Ackroyd and five others intervened, setting up their rights as bondholders of Bynum Irrigation District. The complaint of Brady Irrigation Company and the bill of intervention of Ackroyd, et al., were dismissed on motion of defendant, Winston Bros. Company, and judgment of dismissal entered. The plaintiff appealed and so did Ackroyd, et al. These and Winston Bros. Company are the only parties now before the court. Separate briefs have been filed on behalf of the separate appellants.

We have given consideration to attempting to answer the arguments of the respective appellants with a single argument but because of a slight difference in the manner in which the facts were pleaded in their respective pleadings, and because of the difference in the nature of their interests, we have come to the conclusion, as we did in the lower court, that it will be advisable to take up each brief separately. Before passing to a consideration of the briefs, however, we believe it will be helpful to define the interests of the various parties to the suit.

The plaintiff, Brady Irrigation Company, is a corpora-

tion owning 15.6% of the corporate stock of Teton Co-Operative Reservoir Company (Tr. p. 6). The appellants, Ackroyd, et al., are the holders of bonds of Bynum Irrigation District which is a statutory irrigation district and which owns 80.4% of the capital stock of the Teton Co-Operative (Tr. p. 14). Appellee is the holder of a judgment against Teton Co-Operative for $29,596.53 (Tr. p. 14) representing the balance due it for construction, enlargement and repair of the reservoir, canals and ditches of the Teton Co-Operative (Tr. p. 12). This allegation is contained in the complaint. The bill of intervention of Ackroyd, et al., merely states that the obligation to Winston Bros. Company was "incurred by Teton Co-Operative Company in and about the conduct of its business and affairs." (Tr. p. 68). The Ackroyd bill of intervention, however, makes the allegations of the complaint a part of the bill "insofar as the same are not inconsistent with" the allegations of the bill (Tr. p. 58) and as the allegation above quoted from the complaint as to the purposes for which the obligation to appellee was incurred are entirely consistent with the allegations of the Ackroyd bill, both the complaint and the bill establish that appellee's judgment results from the construction, enlargement and repair of the reservoir, ditches and canals of Teton Co-Operative.

PRELIMINARY ANALYSIS.

The most serious controversy in the case concerns the nature of the rights of the various interested parties in the waters, water rights, reservoir, ditches and canals of

Teton Co-Operative. We feel that nothing would serve to clarify the issues more than a careful preliminary analysis of this situation.

Teton Co-Operative Reservoir Company is a corporation duly organized and existing under the laws of the State of Montana (complaint Tr. p. 7, bill Tr. p. 62) with a capital stock of 1000 shares of the par value of $150.00 each. (Tr. p. 7). The par value is not mentioned in the Ackroyd bill but this allegation in the complaint is not inconsistent with any allegation in the bill and it is, therefore, adopted by Ackroyd, et al. (Tr. p. 58). There is no suggestion in either pleading that the articles constitute the corporation a non-profit corporation or that it was not organized under the statutes relative to ordinary private business corporations operating for profit. Teton Co-Operative was organized in 1906 (Tr. p. 10, p. 62); it owned certain real estate, a reservoir site, and certain water rights in rivers and streams in Teton County, Montana. (Tr. pp. 9 and 10, p. 63). The complaint alleges (Tr. p. 8) that in 1918 the Teton Co-Operative enacted a by-law reading as follows:

> "A-1. Except as it is otherwise provided in these by-laws, each share of the capital stock of this company entitles the holder thereof to *the use during the irrigating Season of each year,* of a one-thousandth part of the waters, water rights and irrigating facilities and systems of this company, including the right to lease, pledge, sell and *dispose of such use.*" (Italics ours).

The complaint further alleges that there is no other by-law modifying or affecting by-law A-1. (Tr. p. 8). The

Ackroyd bill alleges that at all times since its organization the capital stock of Teton Co-Operative has evidenced the ownership of a right to water for irrigation (Tr. p. 64). To this extent the pleadings differ on this point.

BYNUM IRRIGATION DISTRICT.

Bynum Irrigation District is a statutory irrigation district organized under the applicable Montana statutes (Tr. p. 4, p. 59) and, at the time of its organization, it did not own any water (Tr. p. 12, p. 64). It purchased 804 shares (80.4%) of the capital stock of Teton Co-Operative. (Tr. p. 12, p. 64). The Ackroyd bill alleges that this purchase was made for $500,000.00 payable from the proceeds of the One Million Dollar bond issue (Tr. p. 64), of which interveners, Ackroyd, et al., now own bonds of the face value of $923,000.00 (Tr. p. 61). The complaint alleges that it became necessary to provide Teton Co-Operative with $122,034.62 for the purpose of enlarging its reservoir and repairing its system (Tr. p. 12) and that that is the amount of the contract price of appellee's contract for the work. (T. p. 15). This is not inconsistent with the Ackroyd bill and is therefore adopted by interveners.

BRADY IRRIGATION COMPANY.

Plaintiff, Brady Irrigation Company, is a corporation organized under the Montana statutes (Tr. p. 4, p. 58) There is no suggestion that it is not an ordinary private business corporation authorized to operate for profit. It

is alleged that it was organized solely and only for the purpose of delivering water for irrigation and domestic purposes to its stockholders (Tr. p. 4) and that it owned certain water rights, ditches and canals. (Tr. p. 5). Its by-laws entitle the holder of stock to a proportionate share of "all the waters *appropriated and diverted* by this corporation" (Tr. p. 6) (Italics ours). In addition to the water rights above referred to plaintiff corporation was the owner of 156 shares of the capital stock of Teton Co-Operative (Tr. p. 6). At least so far as plaintiff is concerned, this Teton stock carries rights to the use of water only by virtue of the by-law above quoted. (Tr. p. 8). Neither Teton Co-Operative nor Bynum Irrigation District, owning 80.4% of the stock of Teton Co-Operative, nor plaintiff, owning 15.6% of the stock, owns any irrigable lands. Interveners Ackroyd, et al., own bonds of Bynum Irrigation District.

For various reasons set forth in the briefs plaintiff and interveners seek to prevent the sale on execution by appellee of the physical properties of Teton Co-Operative. Both the complaint and the Ackroyd bill allege that at the time appellee entered into its contract it knew the provisions of the by-laws of Teton Co-Operative and knew that the properties of that corporation were necessary for the irrigation of the lands and premises in the Bynum Irrigation District and the lands of the stockholders of plaintiff, Brady Irrigation Company. (Tr. p. 13, p. 68). A representative bond is attached to the Ackroyd bill and provides in part:

"all being a lien *upon all the land* situated in said Bynum Irrigation District as provided by the laws of Montana." (Tr. p. 73).

Such additional references to the facts as may be pertinent will be made in the course of the argument on the various points.

SUMMARY OF ARGUMENT.

After certain brief general statements we propose to demonstrate that the law of Montana is that the status of stockholders in Teton Co-Operative is not that of joint owners of, or owners of an equitable interest in, its property, but the same as that of stockholders in any corporation. (Thaanum v. Bynum Irrigation District, 72 Mont. 221, 232 Pac. 528; Brady Irrigation Co. v. Teton County, 107 Mont. 330, 85 Pac. (2d) 350).

THE BRADY IRRIGATION COMPANY BRIEF.

In discussing the brief of Brady Irrigation Company the case of Pacific States Savings & Loan Corporation v. Schmitt, 103 Fed. (2d) 1002, is analyzed to show that there, as in the other cases cited, the stock in the water companies was held by persons who owned lands with appurtenant water rights and who had the right under the stock to delivery of their water through the ditches, thus distinguishing it from the case at bar. Other cases referred to by this appellant will be analyzed and distinguished.

Next, the Montana authorities holding that such companies as Teton Co-Operative are not trustees holding a

naked legal title will be discussed. (Hyink v. Low Line Irrigation Co., 62 Mont. 401, 205 Pac. 236; Dyk v. Buell Land Co., 70 Mont. 557, 227 Pac. 71).

Other cases cited by this appellant in support of its argument that the property cannot be sold on execution will be taken up and it will be shown that under the Montana statutes this property is subject to execution. (Sections 9410, 9424 and 9428, Revised Codes of Montana of 1935). It will then be shown that there is no offer by this appellant to do equity.

THE ACKROYD BRIEF.

It will be shown that these bondholders have only a lien on lands within the Bynum Irrigation District and that no lien is pleaded on the properties of Teton Co-Operative. The nature of Bynum Irrigation District will be discussed and it will be shown that under the Montana cases above referred to in this summary the Bynum Irrigation District does not own the water rights or other properties of Teton Co-Operative. Cases cited by appellants, Ackroyd, et al., will be discussed and shown inapplicable and it will be shown that there is no offer to do equity.

THE THEORY OF APPELLEE.

No suggestion of doing equity is pleaded or argued by any of appellants.

A water right is not land in any sense but is personal property. (Verwolf v. Low Line Irrigation Co., 70 Mont. 570 on 578, 227 Pac. 68; Maclay v. Missoula Irrigation

District, 90 Mont. 344, 353, 3 Pac. (2d) 286; Smith v. Denniff, 24 Mont. 20, 60 Pac. 398).

The burden of proving that a water right is appurtenant to land is on appellants. (Hayes v. Buzzard, 31 Mont. 74, 82, 77 Pac. 423; Smith v. Denniff, 24 Mont. 20, 60 Pac. 398).

Whether a water right is appurtenant in each case is a question of fact. (Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 290 Pac. 255).

The stockholder in Teton Co-Operative is not a joint owner of the properties with the corporation and the corporation is not a trustee for the stockholders. (Hyink v. Low Line Irrigation Co., 62 Mont. 401, 205 Pac. 236; Dyk v. Buell Land Co., 70 Mont. 557, 227 Pac. 71).

Teton Co-Operative is not a mutual corporation. (Canyon Creek Irrigation District v. Martin, 52 Mont. 339, 159 Pac. 418).

Under the Montana statutes appellee is entitled to execution. (Sections 9410, 9424 and 9428, Revised Codes of Montana of 1935).

Neither the water nor the stock of Teton Co-Operative is appurtenant to any land because neither of the stockholders own any land to which it can be appurtenant. An owner of land owning stock in Brady Irrigation Company cannot sell any water right of Teton Co-Operative. The same is true of the owner of land in Bynum Irrigation District. (Oppenlander v. Left-Hand Ditch Co., 31 Pac. 854 (18 Colo. 142); First National Bank of Longmont v. Hastings, 42 Pac. 691, 7 Colo. A. 129.

Appellants are estopped to enjoin execution. (Atchison v. Peterson, 22 L. ed. 414, 20 Wall. 507).

The properties of Teton Co-Operative are subject to sale on execution. (Drysdale's Appeal, 15 Pa. St. Rep. 457).

This court will not enjoin execution in a state court. (High on Injunctions, 4th Edition, Section 268).

The lower court was right. The solution is the payment of the judgment.

GENERAL OBSERVATIONS APPLICABLE TO THE BRIEFS OF BOTH APPELLANTS.

Before passing to a consideration of the separate briefs we desire to make some general observations.

I.

This is a suit in equity and equities must be weighed. This will be discussed in detail later.

II.

The decisions of the Supreme Court of the State of Montana as to the property rights involved are binding on this court.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188,

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. ed. 1290,

The Ruhlin case applies the holding of the Erie case to suits in equity.

III.

General language in any decision is to be applied in the light of the particular facts involved and a general statement may be misleading unless the facts involved are considered.

Cohens v. Virginia, 6 Wheat. 264, 19 U. S. 264, 5 L. ed. 257 on 290.

The language is quoted with approval in *People of Puerto Rico v. Shell Co.,* 302 U. S. 253, 82 L. ed. 235 on 247. The language is also quoted with approval in *Martien v. Porter,* 68 Mont. 450 on 468, 219 Pac. 817.

IV.

The Supreme Court of Montana has defined the rights of the stockholders of Teton Co-Operative Reservoir Company on two occasions. The first case was *Thaanum v. Bynum Irrigation District,* 72 Mont. 221, 232 Pac. 528. This case is referred to by both appellants. The facts are as follows:

Bynum Irrigation District proposed to purchase 804 shares of the capital stock of Teton Co-Operative Reservoir Company in order to obtain water for distribution to lands in the District. Thaanum sought to restrain the district by injunction from expending any money belonging to the district for the stock. In considering the possible methods of procedure and the property rights which would arise, the court said on page 223:

> "Through negotiations the district acquired an option to purchase 800 shares of the capital stock of the reservoir company, *or, as an alternative, the right to purchase from the stockholders owning 800 shares their respective rights to the use of the waters.*" (Italics ours).

and on page 224:

> "It must be conceded that, if the first alternative option be accepted, *the irrigation district will become a shareholder in a corporation, if the second alternative be chosen, it will, in a sense at least, become a joint owner*

*with the holders of the remaining 200 shares of stock in the reservoir company, * * *"* (Italics ours).

As appears from the transcript and the briefs the irrigation district did purchase 804 shares of the capital stock and, under the language above quoted, it simply became a shareholder in a corporation. The point was raised in a different manner in *Brady Irrigation Co. v. Teton County, et al., Ackroyd, et al., interveners*, 107 Mont. 330, 85 Pac. (2d) 350.

The action was brought by Brady Irrigation Company against Teton County and Ackroyd and others, interveners, to secure an injunction against the County of Teton to restrain the issuance of a tax deed to its irrigation facilities (p. 331). The injunction was granted. The County alone appealed. The County had levied its usual property taxes on the lands which Teton Co-Operative owned in fee for reservoir purposes and on the reservoir site, dams, ditches, canals and other like property. Taxes became delinquent and the authorities threatened to take a tax deed. The rights of the owners of stock in Teton Co-Operative are defined as follows on page 332:

"The owners of the stock in the Teton Cooperative Reservoir Company do not own the equitable title to the property of that corporation, but their relation to it is one of contract. (Hyink v. Low Line Irr. Co., 62 Mont. 401, 205 Pac. 236; Dyk v. Buell Land Co., 70 Mont. 557, 227 Pac. 71)." (Italics ours).

Following an earlier decision the Supreme Court held that when ditches and the right to the use of water conveyed are made appurtenant to lands, their value is included in the value of the land irrigated and is taxed when the land is taxed. (P. 333).

The court quoted with approval from *Verwolf v. Low Line Irr. Co.*, 70 Mont. 570, 227 Pac. 68, 71, a statement that a water right is not land in any sense and when considered alone and for the purpose of taxation, is personal property, but when considered otherwise it is not subject to taxation independently of the land to which it is appurtenant. The only holding of the case is that the value of the water rights and distribution facilities being included in the value of the lands on which the water was used, for purposes of taxation, Teton County could not again tax the water and the facilities. Thus, it appears that in both cases the Montana Supreme Court has held that the owners of stock in Teton Co-Operative do not own the equitable title to the property of the corporation and that they are no different in this respect from stockholders in any other private corporation.

V.

We will turn now to a consideration of the separate briefs.

BRIEF OF APPELLANT, BRADY IRRIGATION COMPANY.

There is no objection to the statement of jurisdictional facts, nor the statement under the subtitle "Jurisdiction of this court," which together take up the first four pages of the brief. This brings us to the statement of the case on page 5. This statement is in the main satisfactory but we wish to point out certain allegations in the complaint which are not mentioned in the statement.

Teton Co-Operative was organized in 1906 (Tr. p. 10) with capital stock of the par value of $150.00 per share (Tr. p. 11). Until 1918 there was no provision in the articles, by-laws or otherwise giving the holder of its stock any rights to the use of water (Tr. p. 8). At least this is our understanding of the allegations at the bottom of page 8 of the transcript. In 1918 the by-law above set forth at page 3 of this brief was adopted. (Tr. p. 8). On page 6 of plaintiff's brief it is stated that the plaintiff was a corporation "organized and operating" only for the purpose of distributing water to its stockholders. The complaint does not allege that it was "organized" only for that purpose and to that extent the statement in the brief was incorrect. On Page 9 of the brief it is stated that the judgment of appellee against Teton Co-Operative arose out of work of *enlarging* the reservoir. The allegations of the complaint are that the obligation was incurred in enlarging and repairing the reservoir and the ditches and canals used in connection with it. (Tr. p. 13). This is important when the argument of plaintiff that it did not benefit from the work is considered.

We come now to the argument commencing on page 16 of the brief of appellant, Brady Irrigation Company, under the subtitle "The property of Reservoir Company is appurtenant to the land irrigated."

Before going into the cases cited in support of that statement we wish to reiterate that this case is different from any of the cases cited by this appellant or, for that matter, by Ackroyd, et al., in that in this case owners of stock in Teton Co-Operative Reservoir Company were

not owners of any land which was irrigated with the waters of, or through the facilities of the Teton Co-Operative. That is, the only stockholders in whom this court is concerned are the Bynum Irrigation District and appellant, Brady Irrigation Company, and there is no allegation that either of these corporations owned any land whatsoever irrigated, or subject to irrigation, from any of the waters or through any of the facilities of Teton Co-Operative Reservoir Company.

The facts of this case are so complicated and the proper application of the law is so dependent upon a clear understanding of the facts that we deem it advisable to reiterate these facts at the commencement of this argument.

The first point made by this appellant is that the by-laws are enforceable contracts (Tr. p. 17). We have no quarrel with this statement nor with any of the cases cited on page 17 on this particular feature.

Appellant next refers to the case of *Pacific States Savings & Loan Corporation v. Schmitt,* 103 Fed. (2d) 1002. It is designated at the bottom of page 17 as "a very similar case," and again on page 25 this case is referred to with the statement that this court "disposed of a situation similar to that presented in the instant case." Appellant quotes liberally from the Schmitt case in support of each statement. As this is a very recent case and one of the few cases cited by appellant which was not cited in the lower court we have deemed it advisable to investigate it fully. We have not only analyzed carefully the opinion in 103 Fed. (2d) 1002, and the opinion in the lower

court, (20 F. Supp. 816) but have also examined the transcript and the briefs.

The facts in the Schmitt case are as follows: One Taylor was the owner of irrigated lands in Nevada and conveyed them, together with appurtenant water rights and water stocks, to John G. Taylor, Inc., a corporation. The corporation thereupon mortgaged the lands together with all appurtenant water rights and mortgagor's interest in all dams, reservoir, ditches, canals and other works for the storage or carrying of water. The water stock was not specifically mentioned. Taylor thereafter made an agreement to pledge to Bank of Nevada the various water stocks as security for advances thereafter to be made to the corporation and to himself. The Bank of Nevada thereafter loaned $32,500.00 to the corporation, taking its notes endorsed by Taylor personally and apparently taking the certificates of water stock, as the same were found in the possession of the Bank when it went into the hands of a receiver. The Bank to whom the corporation gave the mortgage, and the Bank of Nevada, had common officers and directors. The water stock consisted of shares of stock in three canal companies, which shares were owned by Taylor, until transferred to the corporation, and were used by Taylor for conveying waters appropriated by him from the Humboldt River and also waters from the Pitt-Taylor reservoir, all of the waters being for use upon the lands of Taylor which were later mortgaged. None of the three canal companies owned any land and under the Nevada law corporations could not own water rights for irriga-

tion unless they also owned lands to be irrigated. The Pitt-Taylor reservoir was owned by the Humboldt Lovelock Irrigation Light & Power Company which possessed the right to store certain quantities of water taken from the Humboldt River for use on certain designated lands, including the property covered by the mortgage. The rights as to that land were evidenced by two specific certificates. There was no question that under the Nevada law the water rights were appurtenant to the land irrigated and under similar facts we believe this would be the law of Montana. (See Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 290 Pac. 255, in which case, however, it is stated that whether a water right is appurtenant to land is in each case a question of fact).

In the Schmitt case the lower court held that all water and water rights passed under foreclosure proceedings to the mortgagee, and the plaintiff as its successor, but also held that subject to these rights the receiver of the Bank of Nevada was entitled to a lien on the stock under the pledge agreement. Plaintiff, claiming under the mortgage foreclosure, appealed from this holding and the briefs disclose that the question now before the court was not argued. This court held that the stock under the facts had no value apart from the water rights and ditch rights and further held that all of the interest of Taylor in the stock had passed to the corporation. The relative rights of the appropriators of the water had been formally adjudicated in the state courts, the decree adjuding that the right to the use of the water carried

in the system of the ditch companies was appurtenant to the place of use. The court concluded that the attempt of Taylor to pledge the shares was ineffectual, as they had passed by the mortgage and were no longer his to pledge. On page 1004 this court says:

> "It is a generally accepted principle in the arid states that shares in a nonprofit *irrigation company are appurtenant to the land of the shareholder irrigated through the system.*" (Italics ours).

It is to be noted that the statement is that the shares in a nonprofit irrigation company are appurtenant to the land of the shareholder irrigated through the system. As we have pointed out, none of the waters of Teton Co-Operative are used for the irrigation of any land owned by a shareholder. The shareholders are the Bynum Irrigation District and the Brady Irrigation Company and neither owns any lands to irrigate.

We have gone into this case at considerable length because the same argument will apply to the various other cases cited.

On page 18 appellant states that when the Reservoir Company issued a share of its stock it entered into a contract whereby the holder of such share is entitled to a one-thousandth part of the waters, water rights and irrigating facilities and systems and at the bottom of that page it is stated that the contract entered into with the Reservoir Company and the stockholders granted the stockholder the *perpetual* right to the use of one-thousandth part of such waters and facilities. No transcript page is cited in support of this latter statement and we

do not believe it can be sustained by reference to the complaint.

According to the complaint (Tr. p. 8) the only by-law on the subject entitles the shareholder to the use during the irrigating season of each year of a one-thousandth part of the waters, etc., including the right to sell and dispose of such use. It is apparent that the last provision is distinct from the right to sell the share of stock and that the shareholder himself has the right to sell and dispose of the use to any person and for any purpose. The Brady Irrigation Company, a corporation, as distinguished from the individual owner of stock in Brady Irrigation Company, had that right. A land owner who had shares in the Brady Irrigation Company had a right to receive a proportionate share of waters *appropriated* and *diverted* by that company. At the bottom of page 18 is a quotation from *Adamson v. Black Rock Power & Irrigation Co.,* 297 Fed. 905. The land in question was there sold with appurtenant water rights. The promoter of the irrigation enterprise set forth a declaration of trust declaring that the *instrumentalities necessary to the enjoyment of the lands and water rights sold by it were pledged perpetually to the use of the vendees.* As appears from the quotation in plaintiff's brief, upon the facts in that case, the court held that the instrumentalities controlled by the grantor and necessary to the enjoyment of the water were impressed with a servitude or easement.

In Allen v. Railroad Commission, 179 Cal. 68, 175 Pac. 466, cited on page 19 of plaintiff's brief, it was held that the Railroad Commission had power to fix the rates

for water. As appears on page 470, under the contract of sale *the water right is inseparable from and transferable only with the land.* The quotation on page 19 again shows that under the facts in that case an easement attached to the land and the servitude upon the source of supply. Whether or not an easement attached to the land and the servitude upon the ditch depends on the facts and the facts of the Allen case render it inapplicable to the case at bar.

On page 20 appellant argues that the Bynum Irrigation District is a public corporation which purchased 804 shares of the stock of Teton Co-Operative for the sole purpose of providing water for the irrigation of lands within the irrigation district. The Thaanum case, (analyzed supra on page 10) is cited and also Section 7202, Revised Codes of Montana of 1935, providing that the Commissioners shall apportion the waters among the lands and that the waters so apportioned shall be appurtenant to the land and inseparable from the same. From this it is argued that by the Thaanum case the Montana Supreme Court by implication decided that "when water for irrigation purposes was thus acquired by the purchase of stock from the Reservoir Company such water became appurtenant to the land within the district." (Appellant's brief, pp. 22 and 23). As above demonstrated, our Supreme Court in the Thaanum case, held exactly to the contrary. It held that if the Bynum Irrigation District took the option to purchase the stock it became a stockholder in the corporation instead of becoming, in a sense, a joint owner in the use of the

water with the holders of the remaining stock. Having taken the option to purchase the stock, Bynum Irrigation District, under the Montana decisions, became merely a stockholder in a corporation. Even if it were a fact that the water became appurtenant to the lands in the Bynum Irrigation District the next argument of appellant is a complete non sequitur.

It is argued (p. 23) that the same thing would be true with respect to the other stockholders. In other words, having based the argument as to Bynum Irrigation District on an express statute, Section 7202, applying only to irrigation districts, appellant now says that the same thing is true of other stockholders in no way affected by the provisions of the statute.

On page 23 appellant quotes Section 6671, Revised Codes of Montana of 1935, stating when a thing is deemed to be appurtenant to land and states that it has been applied in the case of Brady Irrigation Company v. Teton County, et al., 107 Mont. 330, 85 Pac. (2d) 350, which is analyzed at page 11 of this brief. Appellant quotes the statement that the stockholders of Teton Co-Operative do not have an equitable title to the property of the corporation. The quotation continues that *rights under a share of stock of Brady Irrigation Company* to the use of water, when used on certain lands, become appurtenant to such lands owned by shareholders in Brady Irrigation Company, and that such rights are included in the aggregate value of the land in determining its taxable value, and cannot be taxed again to Teton Co-Operative. The language quoted is apparently quoted

for the proposition that the water rights of Teton Co-Operative became appurtenant to lands of shareholders in Brady Irrigation Company. The language is not susceptible of this interpretation. The statement is that the shareholder in Brady Irrigation Company has a contractual right to his pro rata share of the water received by that company, i. e., the Brady Irrigation Company. The court then says "these rights (that is contractual rights) when used on certain lands become appurtenant to such lands." The rights there referred to can refer only to the contractual rights of the shareholders of Brady Irrigation Company *in waters* of Brady Irrigation Company and Brady Irrigation Company does not own the *waters* of Teton Co-Operative. Also, as we have shown, the only pleaded right is to a share of the waters *diverted and appropriated* by Brady Irrigation Company, not to the waters obtained from the Teton Co-Operative.

But disregarding this latter fact for the moment, the Teton County case is authority only for the proposition that the contractual rights of shareholders of Brady Irrigation Company may become appurtenant to their lands. That this is the correct interpretation is borne out by the next two cases cited.

The first case is *Yellowstone Valley Company vs. Associated Mortgage Investors,* 88 Mont. 73, 290 Pac. 255, cited on page 24. That was an action by plaintiff to recover shares of stock of the Big Ditch Company, which was organized for the purpose of extending, enlarging and maintaining a ditch or canal through which plaintiff's lands received water. The right to the use of water rested

on the ownership of the shares of stock and the lands were continuously irrigated by the water which the stock represents. The Ditch Company did not derive profits from its operations but furnished water to its stockholders at cost, the expense being provided by assessments upon the capital stock. Plaintiff mortgaged to defendant its lands and

> "also all water, water rights, ditches, dams, pumps, pipe lines and hydraulic machinery, reservoir sites, aqueducts, appropriations and franchises upon, leading to, connected with or usually had and enjoyed in connection with the herein described premises, and each and every part or parcel thereof, whether represented by shares of the capital stock of ditch or water companies or by direct ownership, or otherwise, which are now owned, or which may have been or shall hereafter be acquired during the existence of this mortgage, and used in connection with the said described premises, or any part thereof. Together with all and singular the tenements, hereditaments and appurtenances, unto the said property belonging, or in anywise appertaining. * * *." (P. 78).

At the time of the execution and delivery of the mortgages plaintiff assigned and delivered to defendant, in connection with the loans, the certificates of stock, and defendant had the stock transferred to it and new certificates issued. Plaintiff in applying for the loans represented that the lands were irrigated and the mortgages were made upon the basis of irrigated land values. The mortgage was foreclosed and a sheriff's certificate of sale issued, failing to mention the appurtenances and failing to make any mention of water, water rights, or shares of stock; the sheriff's deed simply followed the certificate

of sale. Plaintiff commenced an action against defendant to recover possession of the stock, taking the position that the land having been bid in for the entire amount of the mortgage, the stock must be released. Plaintiff's theory was that the shares of stock were personal property and could not be appurtenant to the land. On page 80 the court defines the determinative question as follows:

> "The determinative question is: Under the facts and circumstances shown, did the mortgage include the water rights represented by the shares of stock?"

The court held that upon the facts the shares of stock in the Ditch Company were appurtenant to the land covered by the mortgage and passed to the defendant. The court says on page 84:

> "We do not overlook the point that whether a water *right evidenced by shares of stock is appurtenant to the land upon which the water is used is a question of fact.* But, upon the conceded facts, that question does not trouble us: clearly, the water is appurtenant to the land." (Italics ours).

The decision merely amounts to a holding that upon the facts presented the shares of stock were appurtenant to the land.

The next case is the Schmitt case, 103 F. (2d) 1002, analyzed at page 14 above. The quotation from this case cites the Yellowstone Valley case and reaches the same conclusion on its own facts. Appellant concludes this section of the brief with a statement that since all of the property of Teton Co-Operative is necessary for storing and distributing water it follows that the persons entitled to the use of the water have easements in all of the prop-

erty of the Teton Co-Operative, which are appurtenant to the lands irrigated. We are at a loss to determine what conclusion appellant seeks to draw from this portion of the argument. As we have already pointed out, the argument, at least as to this appellant, is fallacious, but appellant does not seem to draw any conclusion from it. If the conclusion is that the Teton Co-Operative has a naked legal title not subject to execution, it is not the law of Montana. This argument is directly made in the next subdivision of appellant's brief and will be taken up now.

This brings us to page 26 of the brief of appellant and the subtitle "The property of the Reservoir Company is not subject to a lien by reason of the judgment." After referring to the Schmitt and Teton County cases it is stated at the bottom of page 26 that the Teton Co-Operative is the owner of a naked legal title burdened with easements, which are appurtenant to the lands irrigated. This statement depends on the argument theretofore made which, as we have demonstrated, is not sound. Moreover, the contention is definitely refuted in two Montana cases both involving Low Line Irrigation Company.

In Hyink v. Low Line Irrigation Co., 62 Mont. 401, 205 Pac. 236, the Low Line Irrigation Company was an incorporated mutual ditch company. The right to the use of water owned by defendant and furnished through its canals was represented by shares of the capital stock of defendant. Plaintiff sued for damages for failure to furnish water. The court held on page 404 that the action

was one of contract between the parties. Defendant argued that a stockholder in a mutual company could not recover against the company because the stockholders were tenants in common in the property of the company. The Court refused to adopt this theory saying on page 407:

> "Defendant's argument that a stockholder in a mutual company cannot recover in any event against the company acquires its basis in the theory that the stockholders are tenants in common. Of course, if this be true, then defendant's position is well founded, for a tenant in common cannot be charged with a liability to a cotenant for damages suffered by the latter through no fault of his. (38 Cyc. 84). To adopt the theory of tenants in common, we would have to disregard the purpose and effect of a charter or articles of incorporation; we would obliterate the difference between incorporated and unincorporated mutual companies; the corporation law as to such company would become a nullity. This defendant having formally incorporated under the law and entered the business for which it was incorporated, is charged by law with the duty of exercising reasonable care and diligence in pursuing that business."

This case was cited with approval in Dyk v. Buell Land Company, 70 Mont. 557, 227 Pac. 71. In that case the Low Line Irrigation Company's stock was again involved. The court found, among other things, (p. 569) that the Low Line Company had title to the Low Line and all of the water rights and appurtenances by reason of adverse possession and user, which right was superior to the rights or claims of the plaintiffs, who were stockholders, except that the plaintiffs have the right to receive from the canal the pro rata share of water flowing therein to

which they were entitled as owners of stock of the Low Line Company. Plaintiffs contended that the Low Line Company was but a trustee for its stockholders. The Court abruptly disposed of this contention on page 569 as follows:

> "The assertion of counsel for plaintiffs that the Low Line Company is but 'a trustee for those it serves who own the equitable title,' that is, its stockholders, is directly contrary to the holding of the court in Hyink v. Low Line Irr. Co., 62 Mont. 401, 205 Pac. 236, in which it was held that the stockholders in a mutual irrigation company are not tenants in common but that their relation to the company is one of contract."

It therefore appears that whatever may be the situation in other jurisdictions, the Teton Co-Operative cannot be held to hold only a naked legal title in Montana. Plaintiff argues on page 29 that if Winston Bros. Company were permitted to sell the assets of Teton Co-Operative on execution it would take subject to the rights of the stockholders of Teton Co-Operative. Whether this is true or not, it would not render the complaint or the bill of intervention good as against the Motions to Dismiss unless the property interest of the Teton Co-Operative is exempt from execution. The Hyink and Dyk cases establish a property interest in Teton Co-Operative. That being so the cases cited on page 28 of appellant's brief are inapplicable.

The argument on page 29 is worthy of special analysis. It is stated "the legal title of the Reservoir Company would be burdened with easements in the property, which the stockholders of the *Reservoir Company* have." (Italics

ours). This is as far as appellant could possibly go but would leave him one step short. Appellant is a stockholder but it has no land nor dominant tenement to which an easement could be appurtenant.

On page 30 it is stated that Brady Irrigation Company performs the functions of a public corporation and that if appellee sells the property on execution the corporate existence of Teton Co-Operative would be terminated "since the effect of the contracts between the stockholder and the Reservoir Company would be destroyed." No authority is cited for this proposition and it is apparent that the fact that a corporation is deprived of its property does not terminate its corporate existence. The easy answer is that the corporation can pay the judgment and go on with the performance of its obligations to its stockholders. We find nothing in the complaint indicating any obligation on the part of the Brady Irrigation Company to do more than give the holder of its stock the right to the use during the irrigating season of one-thousandth part of the waters, water rights and irrigating facilities and systems of the company. (Tr. p. 8). We find no allegation indicating the breach of any contract if its water supply and system fail entirely. It is nowhere alleged that Teton Co-Operative is insolvent, merely that its properties are necessary for distributing water to its stockholders, (Complaint paragraph 15, Tr. p. 16) and that the judgment is a cloud on its title. (Complaint paragraph 16, Tr. p. 17).

Appellant then cites *Gue v. The Tidewater Canal Company*, 65 U. S. 228, 16 L. ed. 635. In that case the stat-

utes of Maryland did not authorize the sale of the franchise of the Canal Company and the Court held that the equities of other creditors and of the stockholders would prevent the sale of the property levied upon as it would be worthless without the franchise. The canal was open to all persons and its revenue depended upon taking toll on boats going through the canal which right would not pass to the purchaser at execution sale. The case is not in point.

It is to be noted that in that case the court weighed the equities of other creditors and of the stockholders. Appellant makes no argument as to equities other than to say at the top of page 37 that it is clear from the allegations of the complaint that the judgment was based on an indebtedness incurred for the sole benefit of Bynum Irrigation District. No reference is here made to the transcript for, as we have pointed out, the complaint alleges that the indebtedness was for repairing its system for acquiring and storing water for irrigation purposes (complaint para. 11, page 12) and for enlarging and repairing the reservoir and canals and ditches used in connection with it. (Complaint para. 12, p. 13).

The last case cited in this subdivision of the brief is *Eldredge v. Mill Ditch Co.*, 90 Ore. 590, 177 Pac. 939. As this case is also relied upon by Ackroyd, et al., we deem it advisable at this time to analyze and discuss it. It was a suit in equity to enjoin and set aside the execution sale of the water rights and ditch property of the Mill Ditch Company, a mutual corporation for the distribution of water. The articles of the Ditch Company

are not set forth and it does not clearly appear what a "mutual water serving company" is. The Oregon section with reference to executions is set forth on page 940 as follows:

> "All property, including franchises, or rights or interest therein, of the judgment debtor, shall be liable to an execution, except as in this section provided. The following property shall be exempt from execution, if selected and reserved by the judgment debtor or his agent at the time of the levy, or as soon thereafter before sale thereof as the same shall be known to him and not otherwise: * * *
>
> "Subd. 6. All property of the state or any county, incorporated city, town, or village therein, or *of any other public or municipal corporation of like character.*" (Italics ours).

This statute distinguishes the case, as the Montana statutes contain no such exemption.

Section 9410 of the Revised Codes of Montana of 1935 reads as follows:

> "Judgment lien—when it begins and when its expires. Immediately after filing the judgment-roll, the clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon *all real property of the judgment debtor not exempt from execution in the county,* owned by him at the time, or which he may afterward acquire, until the lien ceases. The lien continues for six years, unless the judgment be previously satisfied."

The declaratory judgment that the judgment of Winston Bros. Company is not a lien cannot issue therefore unless the property of Teton Co-Operative is exempt from execution.

Section 9424, Revised Codes of Montana of 1935, provides:

> "What shall be liable on execution—not affected until levy. All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, *not exempt by law,* and all property and rights of property, seized and held under attachment in the action, are liable to execution."

The statutes providing for exemptions are Sections 9427 to 9430.2, R. C. M. 1935, both inclusive. The only exemption which might be claimed to apply is that set forth in Section 9428, subdivision 10. The first paragraph of the section and subdivision 10 read as follows:

> "Specific exemptions. In addition to the property mentioned in the preceding action, there shall be exempt to all judgment debtors who are married, or who are heads of families, the following property:
>
> 10. All courthouses, jails, public offices, and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, *and appurtenances belonging and pertaining* to the courthouse, jail, and public offices belonging to any county of this state, and all cemeteries, public squares, parks, and places, public buildings, town halls, public markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such city or town to health, ornament, or public use, or for the use of any fire or military company organized under the laws of the state. No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona-fide resident of this state shall have the benefit of these exemptions. No person can claim more than one of the

exemptions mentioned in the first six subdivisions of this section." (Italics ours).

The section is confused in that it applies only to judgment debtors who are married, or who are the heads of families, but assuming that it applies to Teton Co-Operative Reservoir Company, it provides that public offices and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, and *appurtenances* belonging and pertaining to the courthouse, jail, and public offices belonging to any county of this state, are exempt.

It further provides that nothing mentioned in the section is exempt from execution issued upon a judgment recovered for its price * * * and no person not a bona fide resident of this state shall have the benefit of these exemptions. The Bill of Intervention of Ackroyd, et al., alleges that none of these interveners are residents of Montana (Bill of Intervention, paragraph II). Brady Irrigation Company is not asserted to be a public corporation; its claim is that the only title of Teton Co-Operative is a naked legal title. The complaint, the bill of intervention, and the briefs make claim that the property of Teton Co-Operative is appurtenant to the lands of the stockholders of Brady Irrigation Company and to the lands within the Bynum Irrigation District. The only appurtenances exempt by statute are "appurtenances belonging and pertaining to the court house, jail and public offices belonging to any county of this state." It should be understood that we emphatically deny that the property of Teton Co-Operative is appurtenant, but point

out the statute to show that even if it were it would not come within the terms of the statutory exemptions. Interveners Ackroyd, et al., claim that the property of Teton Co-Operative belongs to the Bynum Irrigation District, a public corporation, and is public property and therefore exempt. We emphatically deny this also but at this time merely point out that it is not Bynum Irrigation District which urges this position but the contention is put forward by non-resident bondholders holding bonds of the District and under the statute they are specifically precluded from having the benefit of the exemptions. Plaintiff and Interveners Ackroyd, et al., have failed to bring themselves within the terms of the statute.

Comparison of the Oregon section of the statute quoted on page 940, and particularly of the last sentence quoted, with the Montana statute shows that whereas property of public or municipal corporations of like character to counties, cities, towns or villages is exempt in Oregon, in Montana there is no such provision. The Court in the Eldredge case cites four classifications of property which are exempt from execution.

The first is the equitable title in land where the legal title is not in the debtor but in some third person. Much reliance is placed in the opinion on this classification but in Montana that kind of property is subject to execution. Thus, in the case of Stone Ordean Wells Co. vs. Strong, 94 Mont. 20, 29; 20 Pac. (2d) 639, it was held that the lien of a creditor who seeks to have a conveyance of realty set aside as fraudulent, may be seized and sold on execution. Statutes in all respects similar to the Montana

statute were held to permit the sale of an equitable interest in real property in the following cases:

See: York v. Stone, 34 Pac. (2d) 911, 178 Wash. 280.
Lynch v. Cunningham, 21 Pac. (2d) 154, 131 Cal. App. 164.

The Eldredge case has been strictly limited in Oregon by the decision of the Supreme Court in a case entitled "In re Rights to Use of Water of White River and its Tributaries," 141 Ore. 504, 16 Pac. (2d) 1109, where the court says on 1115:

"The right of an irrigation company to own and operate its irrigation system is a sacred right to real property. So also is the right of the water users to use the water from the system in accordance with their contracts. See Pleasant View Irrigating Company v. Milton-Freewater & Hudson Bay Irrigation Company, 16 P. (2d) 939, decided December 13, 1932, by Mr. Justice Campbell, where he quotes from the case of Eldredge v. Mill Ditch Company, 90 Ore. 590, 177 P. 939, and it is construed in considering the rights of a ditch company, organized for the purpose of delivering, renting, and selling water rights to irrigators. In the Pleasant View Irrigation Company case the water users constructed a ditch along the line of the Milton-Freewater & Hudson Bay Irrigation Company ditch and claimed the right to the water dating from the time that they had used it from the Hudson Bay Company's ditch. *The opinion in the case of Eldredge v. Mill Ditch Company is not authority for the turning over of the rights of way, reservoirs, reservoir sites, flumes and ditches of every kind and description of the Wapinitia Irrigation Company or the Mt. Hood Land & Water Company. The Eldredge Case is cited by counsel for respondent, suggesting that 'it is closely approaching public ownership of irrigation systems.' With this contention we cannot agree.*"

The Eldredge case is distinguished by the Supreme Court of Washington in Opportunity Christian Church v. Washington Water Power Company, 136 Wash. 116, 238 Pac. 641, where the court says on page 643:

> "In the case of Eldredge v. Mill Ditch Co., 90 Ore. 590, 177 P. 939, certain language was used which, in a general way, tends to support the views of the appellants, but the facts of that case are so different from those here that we think the language ought not to be made applicable to this case. The question there was whether water rights, ditches, etc., held by a mutual water serving company for the benefit of its members, could be levied upon and sold to satisfy an execution against the corporation. It was in discussing this question that the court held that the relationship of the corporation to the members thereof was that of a holding company, trustee, or agent. The decision of the court was greatly affected by the statutes of Oregon, and we are unable to determine from the reading of the opinion whether the plaintiff in that action was a stockholder of the water company or merely had a contract with it whereby it was to furnish him with the water. In any event, there was not involved any question of a stockholder maintaining a suit against a third person who had entered into a contract with the company.
>
> "It is our view that the appellants in this case are in no different relationship with the water company than any stockholder in any private corporation, and that the general rules with reference to the maintenance of suits of this character must apply here."

The case of *Canyon Creek Irrigation District v. Martin,* 52 Mont. 339, 159 Pac. 418, is in point here. In that case one of the important features was that the stock of the corporation was shown by its articles to have a commercial value. (p. 343). The pleadings in this case show

that the par value of the stock of Teton Co-Operative was $150.00 per share. The Articles of Teton Co-Operative are not at this time before the court but there is no allegation that the Articles constitute the Co-Operative a mutual company, and such a showing is necessary on the pleadings to bring the plaintiff and the interveners, Ackroyd, et al., within the holding of the Eldredge case, if the Eldredge case were to be followed.

The next classification in the Eldredge case is property held by a trustee under an ordinary naked trust. That situation does not obtain here. Hyink v. Low Line Irrigation Company, 62 Mont. 401, 205 Pac. 236; Dyk v. Buell Land Company, 70 Mont. 557, 227 Pac. 71, both of which cases are above analyzed.

The third classification in the Eldredge case concerns franchises of corporations and rights to an office—neither of which are involved here.

The fourth classification is property so involved with the interest of the public that it cannot be sold without interfering with the rights of the public. This is not the law of Montana. Canyon Creek Irrigation District v. Martin, 52 Mont. 339, 159 P. 418. Completely distinguishing the case on the facts, however, is the fact that *it appears from the opinion in the Eldredge case that the individual stockholders owned the land on which the water was used.* It is not clear from the opinion whether they did not also own the actual water rights but it is a sufficient ground of distinction between the Eldredge case and the case at bar that the stockholders of Teton Co-Operative in no instance own any land, the stock being

held by Brady Irrigation Company and Bynum Irrigation District.

Appellant then closes with the argument on page 33 that execution should be enjoined since appellee would "most probably, realize scarcely anything from the irrigation works." This seems a bit gratuitous under the complaint, for it is not deducible from it; it also seems incongruous in a suit in equity. Leaving out of consideration the owners of land in Bynum Irrigation District it appears from paragraph 19 of the complaint on page 18 that 10,000 acres of Bynum Irrigation District land is irrigated from the reservoir. So, apart from the Bynum Irrigation District lands, the sum of $1.89 per acre on the lands of stockholders of Brady Irrigation Company would have liquidated the obligation in 1927 (Tr. p. 14) and approximately $3.00 an acre would have done it after the judgment was obtained. (Tr. p. 14). Instead of such a simple solution appellant now says that appellee, having done the work on the construction and enlargement and repair of the dams and reservoirs of a private corporation, should be enjoined from realizing on its judgment because irreparable damage would be done the stockholders of the Brady Irrigation Company. Obviously there is no equity in the claims of appellant, Brady Irrigation Company. It is respectfully submitted that the lower court properly dismissed the complaint.

THE ACKROYD BRIEF.

We again wish to make certain comments with reference to the statement of the case. It is nowhere claimed

that the lien of the bonds extends to the properties of the Teton Co-Operative and under the provisions of the bond that it is a lien "upon all the *land situated in said Bynum Irrigation District*" the reason is apparent. (Tr. p. 73). It is not claimed that the reservoir is in the Bynum District.

The articles of Teton Co-Operative are not pleaded.

The net result of services at cost and at a profit, with distribution of profits pro rata to the stockholders, is the same.

On page 6 appellant quotes a conclusion in the pleadings that the Teton Co-Operative is only an instrumentality or agency of its stockholders but unless conclusions are consistent with the facts pleaded they are not to be taken as admitted by a motion to dismiss.

Halko v. Anderson (Mont.), 93 P. (2d) 956 (Adv.)

The position of appellants, Ackroyd, et al., is stated on page 9 of the brief and is that Teton Co-Operative has but a bare legal title which may not be sold under the judgment and that our only remedy is to compel the district to levy charges as taxes to raise the money. Obviously, we have no right against the District. It is not indebted to us in any way, shape or form, nor do we have a judgment against it.

Appellant also suggests the right to enforce against the remaining stockholders, but having contracted with a corporation and obtained a judgment against it we cannot, of course, take execution against the property of its stockholders.

Subdivision A of the brief commencing on page 11 is devoted to a discussion of the public character of the

property involved, the argument being based on the proposition that the Bynum Irrigation District is a public corporation. Cases are cited from Montana and from various other jurisdictions. We see no reason to go beyond the Montana decisions. Once again the Thaanum case (72 Mont. 213, 232 Pac. 528) defines the nature of the very district in question. The injunction was sought under a constitutional provision prohibiting the state and any county, city, town, municipality, or other subdivision of the state from giving or loaning its credit in aid of any individual, association or corporation. In discussing the nature of the Irrigation District the court said on page 225:

> "Such a district is not the state; neither is it a county, city, or town. It is not a municipality, for the term 'municipality' refers to a municipal corporation (Black's Law Dictionary) and in this state only incorporated cities and towns are municipal corporations (Hersey v. Neilson, 47 Mont. 132, Ann. Cas. 1914C, 963, 131 Pac. 30). It remains to be determined whether an irrigation district is comprehended by the term 'other subdivision of the state.'
>
> "A word or phrase may have different meanings as it is employed in different connections (Barnes v. Montana Lumber & Hardware Co., 67 Mont. 481, 216 Pac. 335), *and the particular meaning to be attached to it in a given statute or constitutional provision is to be measured and controlled by the connection in which it is employed, the evident purpose of the Act, and the subject to which it relates.* (Northern Pac. Ry. Co. v. Sanders County, 66 Mont. 608, 214 Pac. 596)." (Italics ours).

The court held that the irrigation district was not within the constitutional prohibition, saying on page 227:

"Because the state, a county, city, town or municipality has, and an irrigation district has not, the authority to impose general taxes, the reason for the restriction upon the first class of public corporations fails, when considered with reference to an irrigation district, and leads to the conclusion that an irrigation district was not in the contemplation of the framers of our Constition in drafting section 1, Article XIII, above, or in the contemplation of the people in adopting it."

Subdivision B of appellant's brief takes up the Thaanum case. The burden of the argument is that Teton Co-Operative has legal title to the real estate and that by its holding in the Thaanum case our Supreme Court held that "that stock and all it represents, namely, the irrigation system involved became public property in every sense of that term." As we have pointed out, the Supreme Court held that the Bynum Irrigation District had two options and took the one which constituted it the owner of the corporate stock instead of the owner of a joint interest. (Supra, page 10.) The argument continues that there is no difference in fact or in law between the purchase of stock and the purchase of the irrigation system, but the Thaanum case and the Teton County case hold directly to the contrary.

It is then argued that by the purchase of stock the Teton Co-Operative became a mere holding company, agent, or trustee for Bynum Irrigation District. This is directly contrary to the holding in the Hyink and Dyk case (supra, pp. 25 and 26).

The same thing is applicable to the argument that the purchase of 80.4% of the stock created the same condition in legal effect as if the district had bought the

irrigation system and allowed surplus water to the extent of 19.6% to go to some private persons. (Appellant's brief p. 20).

This leads, on the same page, to the erroneous conclusion that the water rights were acquired under the Thaanum case and are owned by the Bynum Irrigation District. This is obviously an attempt to bridge the gap necessary to bring this case within such decisions as the Schmitt case, but it is not the law of Montana. It is obvious that Bynum Irrigation District has no water rights which it could sell or transfer; all that it could transfer would be capital stock of Teton Co-Operative.

It is next stated on page 21 that water rights do not exist apart from the dams, ditches and waters, but this is directly contrary to the Teton County case, 107 Mont. 330, 85 Pac. (2d) 350, where the court says on 333:

> "In the case of Verwolf v. Low Line Irr. Co., 70 Mont. 570, 227 Pac. 68, 71, this court said, 'A water right—a right to the use of water—while it partakes of the nature of real estate (Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054), is not land in any sense, and, when considered alone and for the purpose of taxation, is personal property."

Appellant then calls attention to this very case stating that it holds that the irrigation facilities held by Teton Co-Operative were not subject to taxation but, as we have pointed out, the reason for the holding was that their value had already been taken into account in appraising the lands on which the water was used. The court in that case went behind the corporate entity only to look at the nature of the property taxed and determine

that while the Bynum Irrigation District owned the stock it did not own the water rights and that their value was already included in the value of the land taxed.

This brings us to Subdivision II on page 23 where the argument is made that Teton Co-Operative is a mere trustee of the real estate. We have already covered this point (supra p. 26) and will not here repeat what was there said. Appellant agrees on page 26 that the point presented here was not involved in the Schmitt case and then passes to the Eldredge and Gue cases analyzed above at pages 27 to 35.

In *Northern Pacific Ry. Co. v. Schimmell,* 6 Mont. 161, 9 Pac. 889, cited on page 29, the Supreme Court of Montana held that because the railroad was a military and post road used for the benefit of the United States Government, property owned by it and reasonably necessary to its operation was exempt from execution (see p. 165).

We come now to Subdivision III on page 30, making the argument that the property may not be sold on execution because of its public character. The argument is summarized on page 31 stating that first, the statutes of Montana do not authorize the sale and second, that it is against public policy. We have shown on page 30 that the statutes do authorize the sale and, moreover, the Teton Co-Operative is not a public corporation, and that we do not claim any right to sell the property of Bynum Irrigation District, which is the only corporation involved which is claimed to be a public corporation.

The entire argument is based on the false premise that

the real estate of Teton Co-Operative belongs to the Bynum Irrigation District. To begin with, the Montana cases above cited show that the Bynum Irrigation District has no right in the ditches or reservoir. Bynum Irrigation District owns no land to which any ditch rights could be appurtenant and it therefore cannot even have an easement in the ditches and reservoir but at most has a contractual right to have water delivered to it.

In the next place Bynum Irrigation District owns only 804 of 1000 shares of the Teton Co-Operative. Yet it appears to claim title to all of the property of the Co-Operative. The premise not being correct, the conclusions are necessarily incorrect.

Montana has by statute settled the argument as to the right to execution. It provides that all real property not exempt from execution shall be subject to a lien and to execution. It then provides what property is exempt. This does not include the property here in question. (This brief supra p. 30). The argument on page 32 ff. is beside the point. Moreover, it assumes, as other portions of the brief assume, that Bynum Irrigation District owns all of the assets of Teton Co-Operative, whereas, given its fullest effect, the argument could only go to 80.4%.

The case of U. S. ex rel. Masslich v. Saunders, et al., 124 F. 124 and 126, quoted from on page 34 involves a judgment against a city; not against an independent corporation in which the city held stock.

Walkley v. City of Muscatine, 6 Wall. 481, 18 L. ed. 930, referred to as a "controlling case" on page 34 merely

holds that against a city mandamus, instead of a bill of equity, is the proper method of compelling the levy of a tax.

Since appellant does not bother to point out what "general principles" are discussed in California Iron Yards Co. v. Commissioner of Internal Revenue (C. C. A. 9) 47 Fed. (2d) 514, we will only point out that it merely holds that the federal statute with reference to federal income tax matters governs in regard to waivers of limitations.

Whiteside v. School District No. 5 et al., 20 Mont. 44, 49 Pac. 445, holds that in the absence of express statutory provisions a mechanics' lien does not attach to a school building. The case is short and clearly is inapplicable. In the first place the execution statute does not exempt property of the nature here in question, even if owned by an irrigation district. In the second place, the conclusion of the court on page 46 shows that the case does not purport to deal with a direct judgment creditor who sold property to the trustees, and that the decision is based largely on the proposition that the claim can be collected. The court says:

> "The appellant contends, however, that the very last clause of sub-division 9 of the exemption statute renders a school house subject to the levy of an execution. After providing that public property shall be exempt, the statute continues: 'But no article or species of property mentioned in this section shall be exempt from execution issued upon a judgment recovered for its price, or upon a mortgage thereon.'
>
> "But we think that the language quoted is entirely inapplicable to the case of a sub-contractor who is seek-

ing to foreclose a mechanic's lien. Not having the right to subject the property to the lien, it should not be subjected to a sale to enforce such lien. (State v. Tiedemann, 69 Mo. 306).

"Whatever may be the rights of a direct judgment creditor of the school district, who has sold property to the trustees for public uses, it is certain that the statute does not mean to limit the previous general words of exemption by permitting a school house to be sold under an execution in favor of a sub-contractor who has no special lien, for a small part of its value, and perhaps to be forever lost to the school district before funds could be collected by a tax levy wherewith to pay the amount of the debt."

The next case cited is *State v. Blake* (Utah) 20 Pac. (2d) 871. In that case the court said on page 876 that the drainage district exercised governmental function, which is not true of Teton Co-Operative.

In *People ex rel. Post, et al., v. San Joaquin Valley Agri. Assn., et al.* (Cal.) 91 Pac. 740, the court said on page 744 that the association was merely a state agency, which is likewise not true of Teton Co-Operative.

Sherman County Irr. & Water Power & Improvement Co. v. Drake, et al., (Neb.) 91 N. W. 512, merely held, as the quotation on page 37 of the brief shows, that in the absence of a statutory authorization, the property of the canal company could not be sold on execution. We do not seek to sell the property of a public corporation, but of Teton Co-Operative, and the Montana statutes permit its sale.

Do these interveners come here with clean hands? Appellant says on page 38 that to get relief in equity, that is necessary. The bonds they hold give them a lien

on all the land in the district. (Tr. p. 73). Their bonds were obviously without value unless the reservoir was constructed and repaired. They got the benefit of the work done by appellee. Their investment proved "sour." So they seek to prevent appellee from realizing on the contract for the work done by obtaining execution against the assets of the corporation, controlled by the Bynum Irrigation District, which contracted to pay for it. Why? Because, they say, an execution sale would jeopardize and destroy the rights and liens of interveners. Against what? They have under their bonds no rights or liens against the property of Teton Co-Operative. The execution will not affect the lien against the lands in the District. It will affect the value of the lands, unless the judgment is paid, but those lands consist of 47,200 acres (Tr. p. 11) which benefited directly from the construction. If the owners had wanted to protect their ability to get water from Teton Co-Operative, some forty cents an acre would have done it when the work was finished. If the owners of Brady Irrigation Company stock had come in thirty-four cents an acre would have done it. But, no. Appellee should bear the whole loss so that these bondholders will be protected in an investment secured by a lien on lands against which no recourse is sought by appellee.

There is neither pleaded nor suggested by this appellant any desire or willingness to do equity in any particular.

THEORY OF APPELLEE.

To begin with there is no reason that equity should aid either appellant. Neither pleads any inequity on the part of appellee or any offer to do equity on the part of appellants. What it amounts to is that appellee would lose the balance due it so that the recipients of the benefit of the work which appellee did would get it for nothing.

THE NATURE OF A WATER RIGHT

A water right in Montana is not real estate. The nature of a water right is set forth in Verwolf v. Low Line Irr. Co., 70 Mont. 570, 227 P. 68, where the court says on 578:

> "A water right—a right to the use of water—while it partakes of the nature of real estate (Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054), is not land in any sense, and, when considered alone and for the purpose of taxation, is personal property. (Helena Water Works Co. v. Settles, 37 Mont. 237, 95 Pac. 838)."

See also Maclay vs. Missoula Irrigation District, 90 Mont. 344, 353, 3 P. (2d) 286, and Smith vs. Denniff, 24 Mont. 20, 60 Pac. 398.

An easement for the conveyance of water across the land of another is an interest in real estate. (Smith v. Denniff). The burden of proving that a water right passes with a conveyance, which is generally spoken of as the burden of proving that a water right is appurtenant, is upon the person alleging it.

Hayes v. Buzzard, 31 Mont. 74, 82, 77 Pac. 423.

Smith v. Denniff, 24 Mont. 20, 60 Pac. 398.

That being so the complaint must demonstrate that the water right is such "appurtenance" in order to state a cause of action. The question of whether a right to the use of water represented by stock is such an "appurtenance" is a question of fact.

Yellowstone Valley Co. v. Associated Mortgage Investors, 88 Mont. 73, 290 Pac. 255.

The stockholder entitled to the use of a portion of the water of the corporation by reason of ownership of stock is not a tenant in common in the property of the corporation and the corporation is not a trustee for the stockholders.

Hyink v. Low Line Irr. Co., 62 Mont. 401, 205 Pac. 236.

Dyk v. Buell Land Co., 70 Mont. 557, 227 Pac. 71.

A corporation acquiring a reservoir and storing water to irrigate the lands of its stockholders, with a corporate stock which is commercially valued and with broad powers set forth in its articles as to the disposition of water, is not a mutual concern with functions of carriage only and its articles and not its by-laws determine its essential nature.

Canyon Creek Irr. District v. Martin, 52 Mont. 339, 159 P. 418.

THE RIGHT TO EXECUTION.

The only property exempt from execution in Montana is that which is specifically exempt. Section 9428, R. C. M. 1935.

The only exemption which might apply is Subdivision 10, Section 9428. We will not repeat the argument as to the property covered by that exemption. There are, however, other provisions of that section which are important at this time. These provisions read as follows:

> "No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions."

It is alleged in the complaint (paragraph 12, Tr. p. 12-14) that the judgment of Winston Bros. Company is based on a promissory note for the balance due on a contract for the enlargement and improvement of the reservoir. The judgment is therefore for the price of the enlarged or improved reservoir and for this reason would not be exempt even if it were a court house or jail, or any other species of property specifically described.

Furthermore, the Interveners, Ackroyd, et al., are all nonresidents of Montana and subdivision 10 provides that no person not a bona fide resident of the state shall have the benefit of any of the exemptions set forth in subdivision 10.

NEITHER THE WATER NOR THE STOCK IS APPURTENANT TO ANY LAND.

With the above statement of the principles involved it readily becomes apparent that no stockholder of Brady Irrigation Company and no owner of land within the Bynum Irrigation District has any water right which could give him any rights in a ditch or reservoir.

Under the allegations of the complaint and of the bill of intervention either Brady Irrigation Company or Bynum Irrigation District has the right to sell or dispose of the water to the use of which it is entitled by reason of its stock ownership to any person or for any person (by-law A-1, Tr. p. 8). If either stockholder ties itself up by contract to deliver a proportion of its water to a given person, it does not make any water appurtenant to the land of the stockholder for it can supply either water which it has appropriated or which it may obtain from any other source. Brady Irrigation Company has its own appropriations. (Tr. p. 5). As a matter of fact Brady Irrigation Company has no contract or other obligation to deliver any water obtained through stock ownership in Teton Co-Operative. Its obligations are set forth in its by-laws. (Tr. p. 6). The waters of Teton Co-Operative are neither appropriated nor diverted by Brady Irrigation Company. Under these circumstances stock in Brady Irrigation Company might come within the purview of the Schmitt case. That would depend on the facts, but if the stock in Teton Co-Operative is appurtenant it must be appurtenant to some land. If it were appurtenant to the land of a stockholder of Brady Irrigation Company, or to the land of a land owner in Bynum Irrigation District, it would pass with the land. Obviously this is impossible. The Brady Irrigation Company, moreover, owns no land to which rights could be appurtenant and the same is true of the Bynum Irrigation District. The right of a stockholder of Brady Irrigation Company to the use of

water is dependent on the rules and regulations of the corporation. (See by-law A-1 set forth in the complaint and the brief of Appellant Brady Irrigation Company).

The right of a landowner in Bynum Irrigation District to the use of water depends on an apportionment by the Commissioners (Section 7207.2, R. C. M. 1935). That section reads as follows:

> "Commissioners' power to regulate, supervise, apportion and control distribution of water. In addition to all other powers granted them by the laws of Montana, boards of commissioners of all irrigation districts now or hereafter organized under any law of this state, shall have the power and authority to regulate, supervise, apportion and control the furnishing and delivery of water through the distribution system of the district; provided, that such authority to regulate, supervise, apportion and control shall not apply to users who have water rights or ditch rights, established, acquired by court decree, use, appropriation or otherwise, at the time or prior to the organization of such district, without regard to whether said distribution system, or any portion thereof belongs to the district or to the owner of lands served by said district."

It is apparent that the legislature contemplated that landowners might have water rights or ditch rights prior to the organization of the district and separate and apart from any rights under the district, but that apart from such rights the right to the use of water was subject to an apportionment and control by the commissioners of the district. The owner of land in the Bynum Irrigation District could not sell any water right with his land unless he owned such water right apart from the water contracts of the district, and in such event he could sell

it for use on land outside the district. He could not permanently dispose of the right of his land to water of the district unless he also sold his land and in no event could he by purporting to dispose of his right to the use of water, free his land from the liability of irrigation district assessments. An owner of a water right can sell it apart from and separate from the land.

Maclay v. Missoula Irrigation District, 90 Mont. 344, 3 P. (2d) 286.

Smith v. Denniff, 24 Mont. 20, 60 Pac. 398.

It follows that he does not own any water or water right.

An owner of land in the Brady Irrigation Company cannot sell any water right of the Teton Co-Operative. The following two Colorado cases throw considerable light on this situation. Oppenlander v. Left-Hand Ditch Co., 18 Colo. 142, 31 P. 854, where the court said on 857:

"In the next place, Baun's rights to water from Left-Hand Ditch were dependent upon, and evidenced by, his two shares of stock. These he could legally transfer only by assignment on the books of the corporation. While Baun caused the land to be conveyed to his wife and children, he did not convey the stock, nor does it appear that he entered into any contract or received any consideration for the conveyance of the stock. On the contrary, he retained the stock, and continued to act as a stockholder of the company, in his own name. It is true, Baun used the stock as a means of procuring water for the benefit of the land which had been conveyed to his children; but he continued to occupy the land for his own benefit, while he pledged the stock as collateral security, and thereby lost it. With the loss of the stock, he lost all title to the water rights dependent thereon; so that neither he, nor his grantees of the

land, can have any water rights by means of such stock."

and First National Bank of Longmont v. Hastings, 7 Colo. A. 129, 42 Pac. 691, where the court said on 692:

"Water rights belonging to land and stock in a ditch corporation are two essentially different kinds of property. A real-estate owner may have the right to water for the purpose of irrigating his land without owning any ditch stock, and a stockholder in a ditch company may be without the right to water for irrigation or without land to irrigate. Water rights for irrigation are regarded as real property, and shares of stock in a corporation are personal property. The deed conveyed all rights in water pertaining to the land described for the purpose of its irrigation, but it no more conveyed the grantor's water stock than it conveyed his horses."

No cases are cited to the effect that one not the owner of a water right can obtain an easement in a ditch for the conveyance of water. The owner of a water right in this case is Teton Co-Operative Reservoir Company and the rights of plaintiff and of Bynum Irrigation District depend on contract with the owner of the water right.

ESTOPPEL TO ENJOIN EXECUTION.

The same equitable principles apply in a case of this kind that apply in any other case where equitable relief is sought.

Atchison v. Peterson, 22 L. Ed. 414, 20 Wall. 507. This case arose from Montana and involved water rights. The Court said on page 417:

"But whether, upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity

> will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged; whether it be irremediable in its nature; whether an action at law would afford adequate remedy; whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction."

It is suggested that Winston Bros. Company has some other remedy to obtain the payment of its judgment but any such remedy which it might attempt to enforce against Bynum Irrigation District property or property of Brady Irrigation Company, or its stockholders would be met by the defense that its contract is with Teton Co-Operative and its judgment against Teton Co-Operative. In equity if plaintiff or interveners, Ackroyd, et al., wish to prevent the sale of the assets of Teton Co-Operative on the ground that they are owned equitably by plaintiff or Bynum Irrigation District, they should first offer to do equity by paying or providing for the payment of the judgment. Both plaintiff and Bynum Irrigation District have accepted the benefits of the work done by Winston Bros. That being the case they cannot now obtain an injunction to prevent the collection of that judgment.

In Callaghan v. Chilcott Ditch Co., 37 Colo. 331, 86 Pac. 123, it was held that a stockholder in a ditch company who had voted for an assessment could not defend against payment of it on the ground that the stock of the company was not all paid for as required by the by-laws.

In Nelson v. McAllister Improvement Company, 155

Ore. 95, 62 Pac. (2d) 950, it was held on page 954 that where a district improvement water company issued bonds pursuant to unanimous vote, a member of the company was estopped to assert a defense that the district was formed without the employment of an engineer to investigate the advisability, which appointment was required by law.

In High on Injunctions (Fourth Ed.), Sec. 1212, the following statement appears:

> "Where the conduct of the person complaining has been such as to amount to a waiver of his right to object to a proposed conversion of the corporate funds to other than the uses for which they were originally intended, he will not be allowed relief in equity against such use of the funds."

Maryland Savings Institution v. Schroder, 8 Gill & J 93, is cited in support of this statement. In that case the syllabus contains the following:

> "Where a party reaps profits by his own voluntary act, founded upon contract with another, he is not as against the creditors of such other party at liberty to vacate his contract to their prejudice, and claim to participate in equity and conscience, upon the insolvency of such other party, equally with his creditors in his estate and in opposition to the terms and effects of the original agreement."

In Thompson on Corporations, Section 2092 contains the following:

> "The principle (estoppel) is especially operative upon participating stockholders who own a controlling interest in the stock"

and in the 1931 Supplement to Thompson on Corporations, Section 2092 reads:

"Corporate bonds in the hands of bona fide holders cannot be repudiated by the stockholders, where the proceeds of such bonds are retained by the corporation." Citing Gibson v. Kansas City Refining Co., 32 Fed. (2d) 658.

None of these cases are directly in point but all of them lead inevitably to the conclusion that the stockholders of Teton Co-Operative, having taken advantage of the benefits of the contract upon which the judgment of Winston Bros. Company is based, cannot now in equity prevent a sale of the assets of the corporation, at least without offering to pay the judgment, which they have not done.

The Montana cases demonstrate that Teton Co-Operative has more than a naked legal title to its property and in fact that it has legal title not even subject to easements but possibly subject to certain contract rights. Such a right can be sold on execution. This is well exemplified in the case of Drysdale's Appeal, 15 Pennsylvania State Reports, 457. As these reports are not readily available and as the decision is brief, we will set it forth in full:

"The opinion of the court was delivered April 7, 1851, by Gibson, C. J. The lot in question was purchased by the congregation, and the title to it was vested in some of the members in trust, to permit it to be used as a church and school-house. The church was erected, but it was encumbered with mechanics' liens; and to relieve the congregation from the immediate pressure of them, Dr. Ely agreed with five others to purchase them, and give the congregation time to extinguish them. They were transferred to him, and paid for with money advanced by the associates in unequal propor-

tions. After reasonable indulgence, they found that nothing had been, or probably would be done by the congregation; and they agreed to bring the property to the hammer, vest the title in Dr. Ely in trust to sell it, pay their advances out of the proceeds, and give the surplus, if any, to the congregation. It was sold by the sheriff and conveyed to Dr. Ely, who executed a declaration of trust stating the terms of the agreement; and the question is, whether he acquired, by the sheriff's deed, an interest which could be bound by a judgment.

"Unlike the beneficiaries in Allison v. Wilson, and Morris v. Brenizer, who had only an interest in the execution of a power, he had an estate in the soil. He had the legal title, which always may be bound to the extent of the beneficial interest covered by it. It was divested by the sale; and as it certainly rested somewhere, it passed by the sheriff's conveyance to the purchaser. The auditor erred in reporting that it was purchased by Dr. Ely for the congregation on the original trusts; the declaration of trust shows it was not. It was purchased to sell it again to any one who would pay for it; and it had been found that the congregation could not. Dr. Ely was a trustee of the title, not for the congregation beyond its interest in the possibility of a surplus, but for his associates and himself. He was a trustee with a beneficial interest of his own; and it is immaterial whether his equitable estate merged in the legal estate or not. As he had a successor, who could execute the trust only by selling the title entire, it may be assumed that it did not; but his equitable estate in the soil remained in him; and it is not to be disputed that such an estate may be bound by judgment.

"We are, therefore, of opinion and it is so ordered that the decree of the Common Pleas be reversed so far as regards the appellant's judgment, which is decreed to be paid out of the fund in court in its order."

This court will not enjoin execution in state court. High on Injunctions (Fourth Ed.) Sec. 268, after discussing the history of the question, states:

> "The latter and, unquestionably, the better doctrine, however, of the federal courts is that they will not interfere by injunction to prevent a sale of one's property under execution against a third person, issued from a state court, but will leave the party complaining to seek his remedy in the state forum." Citing the following cases:
>
> Daley v. Sheriff, 1 Woods 175.
>
> American Ass'n v. Hurd, 59 F. 1.
>
> Mills v. Provident Loan & T. Co., 100 F. 344.

THE LOWER COURT'S DECISION.

We respectfully refer this court to the decision of the lower court reported in 27 F. Supp. 503. We submit it is well reasoned and correct. No new cases affecting the result are cited. The situation is well summed up in the following quotation from page 508:

> "This case presents rather a difficult situation for all concerned, and the difficulty is not likely to end with this decision, but the court has endeavored to keep in view the way to substantial justice. Of course, the best way out is to make arrangement for the payment of the judgment. It is quite evident that all who are using water from this reservoir are deriving benefit from the improvements made by defendant, in fact they are the chief beneficiaries."

It is respectfully submitted that the judgments of dismissal should be affirmed.

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